TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

(20,022.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 171.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

A. L. SEEGERS AND W. B. SEEGERS, DOING BUSINESS AS SEEGERS BROS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1904, Fourth Circuit, Chesterfield County.

A. L. SEEGERS and W. B. SEEGERS, Partners in Business Under the Firm Name of Seeger Brothers, Plaintiffs-Appellants,
against
SEABOARD AIR LINE RAILWAY, Defendant-Respondent.

Case.

This action was commenced by the service of a summons and complaint in Magistrate's Court in the County of Chesterfield on the 31st. day of August 1903 for fifty-one dollars and seventy-five cents, being $1.75 for claim filed for loss of freight shipped to Plaintiffs and $50.00 for penalty for failure to adjust and pay same within forty days as provided by Statute.

The Complaint, paragraphs I and II, alleged the partnership of the Plaintiffs and the incorporation of Defendant, which allegations were admitted. The Complaint proceeded:

III. That on or about the fifth day of June A. D. 1903 the Pla-ntiffs had shipped to them from Columbia, S. C. over the Defendant's line of railroad to McBee, S. C., being a shipment wholly within the State of South Carolina, one lot of bananas of the original cost of $1.50 which said shipment in part reached its destination at McBee,
S. C. addressed and billed to Plaintiffs on or about the 6th day
2 of June A. D. 1903; but when the said shipment reached McBee, S. C. the same had been destroyed in part, and only about one half thereof was delivered to Pla-ntiffs upon their payment of the freight thereon, amounting to twenty-five cents. Thereupon Pla-ntiffs refused to accept same and returned same to the agent of Defendant at McBee, S. C., who accepted the same and afterwards sold same to other parties.

IV. Thereupon, to wit, on or about the 6th day of June A. D. 1903 Pla-ntiffs filed with J. T. Bailey who was then and is now the agent of Defendant at McBee, S. C. a claim for the original cost of said bananas, to wit, $1.50 and for twenty-five cents freight paid, making a total of $1.75.

V. That the said defendant has failed and refused to adjust and pay the said claim for $1.75 within forty days from and after the filing of such claim with the agent of Defendant at the point of destination of such shipment, to wit, at McBee, S. C.

VI. That Pla-ntiffs are advised and believe that the failure of Defendant to adjust and pay said claim within the said period of forty days has subjected the defendant to a penalty of fifty dollars, to be recovered by Pla-ntiffs, they being the consignees of such shipment.

The prayer asked for $1.75 and for fifty dollars penalty. The Complaint was verified.

The Defendant answered, admitting the shipment, but set up that the shipment reached its destination in the same condition that it was received, that it offered to refund the freight paid which was refused, denied that it was due the Pla-ntiffs anything by way of damages for injury to the shipment of bananas, set up that the twenty-five cents freight paid was not for loss of or damage to property and that Defendant had offered to refund said amount. That on or about the 5th of August 1903 Defendant had tendered to Pla-ntiffs the full amount of their claim, to wit, $1.75 without the penalty, which was refused. The VI paragraph of the answer was as follows:

3 That the Defendant, further answering the Complaint of the Pla-ntiffs, alleges that the Statute No. 50 of Acts of 1903 under which the penalty set forth in the Complaint is claimed is unconstitutional, and therefore null and void, and the Defendant is not liable to Pla-ntiffs for said penalty.

The case came on to trial before Magistrate S. H. Reid without a jury on the 22nd of September, 1903, and he gave the following judgment under the testimony taken, the Defendant offering no testimony:

I find for the Pla-ntiffs $1.75 and interest from 7th of June, 1903, together with fifty dollars penalty, and the costs of this action amounting to $2.35.

From this judgment the Defendant appealed to the Circuit Court on the following grounds:

I. Because the Magistrate erred in refusing and overruling the motion for a non suit interposed by Defendant, at the close of Plaintiffs' case, on the ground that there was no evidence tending to show that the property alleged to have been lost or damaged while in the possession of Defendant, was delivered to the Defendant in good order, or that the alleged loss of or damage to same occurred while same was in possession of Defendant.

II. Because it is submitted that Act No. 50 of Acts of 1903, under which this suit was brought, is unconstitutional, and therefore null and void, and in violation of Art. 1, Sec. 5 of the Constitution of the State of South Carolina, and of Art. XIV, Sec. 1 of the Constitution of the United States, in that it operates to deprive Common Carriers of property without due process of law, and denies to them the equal protection of the law, and the Magistrate erred in so holding.

III. Because the Magistrate erred in holding that the loss or damage to the said property was as much as One 75-100 dollars, the amount of the claim filed, and the Pl*ia*ntiffs were entitled to have judgment against the Defendant for Fifty Dollars penalty and One 75-100 Dollars damage to the property.

4 IV. Because the Magistrate erred in holding that the freight paid by Plaintiffs was a "claim for loss of or damage to property while in the possession" of Defendant.

V. Because the Magistrate erred in giving judgment for the penalty of Fifty Dollars, when the testimony showed that the claim

filed by Plaintiffs for One 75-100 Dollars was made up of two items, to wit: One 50-100 Dollars, the value of the property alleged to have been lost or damaged while in the possession of Defendant, and 25c. freight paid by Plaintiffs for same.

VI. Because one of the Plaintiffs having testified that the agent of the Defendant, a few days after the claim was filed, offered to pay back to him the freight paid, which he refused, it is submitted that the Magistrate erred in holding that the Plaintiffs were entitled to judgment for the amount for which the claim was filed (which amount included the freight,) and for the penalty of Fifty Dollars and interest.

VII. Because the Magistrate erred in giving judgment against the Defendant for Fifty One 75-100 Dollars and interest, when the law does not provide for interest on the penalty, and when no interest was asked for by the pleadings.

VIII. Because the judgment of the Magistrate was contrary to the law and the evidence.

EDWARD McIVER,
STEVENSON & MATHESON,
Def'ts' Att'ys.

The case came on for trial before his honor Judge R. C. Watts on appeal and the following decree was rendered:

This was a suit in Magistrate Court on a claim for $1.75 for property lost and freight paid thereon, and Fifty Dollars penalty under the Act of 1903, 24 Stat. at Large, 81, for failure to adjust and pay the said claim within forty days, the same being a shipment wholly within this State.

5 The Magistrate gave judgment for the claim and also the penalty. The Defendant appealed on various grounds, making the question among others that this Statute imposed a penalty on a debtor which happened to be a common carrier, not imposed on any other debtor, and thereby denied to Defendant the equal protection of the law. This case is largely in accord with the case of Gulf, Colorado & Santa Fe Ry. Co. *vs.* Ellis 165 U. S. 150, and after careful consideration I sustain the contention of the Defendant. This position is not in conflict with the recent case of Porter *vs.* Charleston & Savannah Ry. Co. 63 S. C. 169, in which the constitutionality of the Act of 1897, Sec. 1711 Civil Code, was considered and sustained. That Act differed materially from the Act of 1903, under which this suit is brought. It did not impose a penalty on common carriers for failure to pay a debt, but for failing to pay or *refuse* to pay within a specified time. The Court in Porter *vs.* Charleston & Savannah Ry. Co., *supra,* in considering the Act of 1897, and in distinguishing it from the Act passed on in Gulf, Colorado & Santa Fe Ry. Co., *supra,* says: "We are of opinion that our Act of 1897 was passed, not for the purpose of enforcing more speedy payment of claims against common carriers, but for the purpose of enforcing more prompt action on the part of common carriers in passing upon the validity of claims presented against them, and that the time allowed by the Act, sixty days after the presentation of

any claim, is reasonable and sufficient to afford an opportunity to investigate the propriety and legality of the claims." Since this case the Act of 1903, now under discussion was passed, in which a penalty is imposed on common carriers for a failure to pay these claims in a given time, and this seems to me to be obnoxious to the constitution both of the State and the United States.

The question is also made that the claim for loss of goods was only $1.50, and that there was charged in the claim filed twenty five cents, freight paid by Pla-ntiffs on said goods, and that this was not "loss of or damage to property," and having filed their claim and brought their suit for other things than those covered by the Statute,
6 mixing up those for which a penalty was allowed and those for which no penalty was allowed, they could not get any penalty in this action. It is unnecessary to decide this question however, as the result would not be affected.

It is ordered, therefore, that the judgment of the Magistrate be modified by reducing the same to $1.75 and cost, in accordance with the above views.

R. C. WATTS,
Presiding Judge.

May 28th. 1904.

The Pla-ntiffs gave due notice of intention to appeal, and they now appeal to the Supeme Court on the following grounds to wit:

I. His honor erred in holding that this act in question, No. 50 Acts of 1903, 24 Statutes at Large, page 81, is in violation of the Constitution of the State of South Carolina and of the United States, and therefore null and void.

II. His honor erred in holding that because the said Act applied only to common carriers, and not to other persons either natural or artificial, that it was therefore null and void; whereas he should have held that the General Assembly of the State has the power to classify the persons, natural or artificial, in the State under the State and Federal Constitutions within certain reasonable bounds, and that a classification of common carriers was such reasonable classification, and that inasmuch as the said Act applied to all persons, natural or artificial, coming under the head of common carriers, that the said Act was not in violation of the Sections of the said Constitutions set out in the decree, or any others.

III. His Honor erred in holding that inasmuch as the Act in question provided for a penalty for failure to pay a claim within a certain time, instead of as under the Act of 1879 to pay or refuse to pay, that it was therefore unconstitutional.

7 IV. His Honor erred in modifying the judgment of the Magistrate by eliminating the amount of the penalty.

W. P. POLLOCK,
Attorney for Pla-ntiffs-Appellants.

To W. P. Pollock, Esq., Attorney for the Plaintiffs-Appellants:

You will please take notice that at the hearing of the above case in the Supreme Court, the Defendant, Respondent will seek to sus-

tain the order and judgment of the Circuit Judge, on the further grounds fully set out in Defendant's III, IV, V & VI exceptions to the judgment of the Magistrate who heard the case.

Respectfully,

STEVENSON & MATHESON,
EDWARD McIVER,
Att'ys for Defendant-Respondent.

We, the Attorneys for Appellants and Respondent, hereby agree that the foregoing shall constitute the case and return for hearing on appeal in the Supreme Court.

W. P. POLLOCK,
Appellants' Attorney.
STEVENSON & MATHESON,
EDWARD McIVER,
Respondent's Attorneys.

8 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1905, Fourth Circuit, Chesterfield County.

A. L. SEEGERS and W. B. SEEGERS, Partners in Business Under the Firm Name of Seegers Brothers, Plaintiffs-Appellants,

vs.

SEABOARD AIR LINE RAILWAY, Defendant-Respondent.

Opinion by IRA B. JONES, *A. J.:*

This action was commenced in a Magistrate Court for the County of Chesterfield to recover $1.75 for loss or damage to freight, a bunch of bananas, shipped August 31, 1903, to plaintiffs at McBee, S. C., from Columbia, S. C., over defendant's line and for fifty dollars penalty for failure to adjust and pay the said loss or damage within forty days as required by the statute. The Magistrate rendered judgment for the whole amount claimed, including the penalty. On appeal to the Circuit Court, Judge Watts modified the judgment of the Magistrate by reducing the amount to $1.75 and costs, holding that the statute imposing the penalty is unconstitutional under the rule stated in Gulf, Colorado & Santa Fe Ry. Co. *vs.* Ellis, 165 U. S. 150. From this judgment plaintiffs appeal, and the main question presented is the constitutionality of said statute.

9 The statute in question is entitled "An Act to regulate the manner in which common carriers doing business in this State shall adjust freight charges and claims for loss of or damage to freight," and was approved February 23, 1904, 24 Stat., 81. Section 2 of said act, which more particularly concerns the present controversy is as follows:

"SEC. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State,

after the filing of such claim with the agent of such carrier at the point of destination of the shipment: Provided, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescibed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further That no common carrier shall be liable under this Act for property which never came into its possession, if it complies with the provisions of Section 1710, Vol. 1, of the Code of Laws of South Carolina, 1902."

This Section was under consideration in the case of C. A. Best *vs.* Seaboard Air Line Railway Co. Manuscript Decision, filed Oct. 20, 1905, in which the question presented was whether an action could be maintained for the penalty alone, when there had been voluntary payment and receipt of the loss or damage before suit but after the expiration of the time named in the statute. This Court held that such action could not be maintained. The Court used this language: "The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a Court, operating as a deterrent of the carrier in refusing to settle just claims and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Under this view the common carrier is made liable for a penalty only in the event of a refusal to pay a claim for loss or damage to goods while in his possession, the *bona fides* and justice of the claim being established by a Court of competent jurisdiction.

The present controversy requires the Court to go more fully into the consideration of the purpose of the legislation in question, with a view to ascertain the reasonableness of the classification of common carriers as objects of this particular legislation. Common carriers receive from the State the right to carry on business in the State as such. They are by the State endowed with special powers and privileges which call for special duties and obligations to the public. It is a duty which a common carrier owes, not only under his contract, but under general law, to promptly and safely deliver goods consigned to him for transportation, and he is liable for all loss or damage to such goods while in his possession, not occasioned by the act of God or the public enemy. The duty to make prompt settlement for loss or damage to goods is but an incident of the duty

to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to
11 that end. Whether the adoption of such means is wise, politic or adequate is exclusively a legislative question, for the Courts have nothing to do with the policy, wisdom or expediency of legislation. A statute cannot be declared void unless it manifestly violates some constitutional principle.

This statute is assailed as violative of the equality clause of the fourteenth amendment to the Constitution of the United States and a similar provision in Art. 1., Sec. 5, of the Constitution of this State. The respondents, in argument here, and the Circuit Judge relied on the Ellis Case, *supra*, to sustain the position that the statute is unconstitutional. The Texas statute which was declared void in that case was as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas, that after the time that this act shall take effect, any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper Court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such Court, or any Court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he
12 has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the Court or jury trying the issue."

The difference between the Texas statute and our statute is manifest. The Texas statute subjects railways companies to a penalty, when successfully sued "on a claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, etc." The relation of the railroad company to those who render it services or labor is the ordinary relation of employer and employee and it may with some reason be said that there is no sufficient ground for making a distinction, such as would compel a railroad company to pay such ordinary claims for services within a given time under penalty, when no such obligation is imposed upon other employers

to whom similar services are rendered. So, the claims for damages may include claims not substantially different from claims for damages against individuals and corporations generally. So also, when there was no statute in Texas requiring railroad companies to fence their track against stock, it may be that it would be unreasonable to impose a liability for such acts different from, or greater than, the liability which should attach to the injury of stock by any other person or class. But we venture to say if the Texas statute had been confined to the regulation of some duty which particularly appertains to common carriers as such and imposed a penalty as a means of securing the performance of that duty, the decision of the Court would have been different. The Supreme Court of Texas had considered the statute *as a whole* and had declared that it was intended to compel the payment of debts. So considering it as a whole, the Court treated it simply as a statute singling out railroad corporations alone and imposing upon them a penalty for failure to pay certain debts.

13 In the case of Atchison, etc. Railway Co. *vs.* Matthews 19 Sup. Ct. Rep., 607, the Court held that a Kansas statute requiring reasonable attorney's fee for the plaintiff in a recovery against the railroad company for damages from fire caused by operating its train did not violate the fourteenth amendment. In the Matthews Case the Court reviewed the Ellis Case and called attention to the fact that the Texas statute was treated as a whole by the Texas Court and was so treated by the Supeme Court of the United States. The Court said: It is true that the Ellis Case was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the Supreme Court of Texas, as appears from this extract from our opinion: 'The Supreme Court of the State considered this statute as a whole, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts.'" The Court further said: So that, according to the interpretation placed upon the Texas statute by its Supreme Court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments, and upholding one part on the theory inconsistent with the policy of the State, while, on the other hand, the purpose of this statute is, as declared by the Supreme Court of Kansas, protection against fire—a matter in the nature of a police regulation." The Court further said: "It is the essence of a classification that upon the class are not cast duties and burdens different from those resting upon the

14 general public. Thus when the legislature imposes on railroad corporations a double liability for stock killed by pass-

ing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the Courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could, under no circumstances, recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this Court has unanimously said that this differentiation of liability, this inequality of right in the Courts, is of no significance upon the question of constitutionality. Indeed the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the State, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is affirmed."

In the case of Erb, Receiver, *vs.* Morasch, 20 Sup. Ct. Rep., 819, it was held that an exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within a city does not make an unreasonable classification in denial of the equal protection of the laws. Responding to the suggestion that there was testimony that the operation of the street railway was in fact more dangerous than the operation
15 of the railroad in the hands of plaintiff, receiver, the Court said: "It is not a question to be settled by the opinion of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference and, that existing, it is for the city council to determine whether separate regulations shall be applied to the two. * * * Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations."

In the case of Fidelity Mut. L. Asso. *vs.* Mettler, 22 Sup. Ct. Rep., 667, over a strong dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brown concurred, pointing out that the decision was in conflict with the Ellis Case, the Court nevertheless held, that a Texas statute imposing upon life and health insurance companies, upon failing to pay a loss within the time specified in the policy, after demand therefor, a liability to the holder of the policy, in addition to the amount of loss, of 12 per cent. damages and reasonable attorney's fees, did not deny the equal protection of the law to such life and health insurance companies, although such an obligation was not imposed upon other classes of insurance companies or associations. This decision was reviewed in Iowa Life Ins. Co. *vs.* Lewis,

23 Sup. Ct. Rep., 133, and the Court expressed satisfaction with the case and its reasoning.

In the Mettler case the Court said: "The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statute, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profits (and we are not called on to
16 refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

It appears to us that there is even stronger reason for sustaining a classification of all common carriers of freight for legislation, with respect to their quasi public duties as such, having also in mind the necessity of the prompt payment of losses sustained by failure to perform said duty, as in many cases such losses represent food, raiment and other necessities of life.

In the case of Farmers' and Merchants' Ins. Co. *vs.* Dabney, 23 Sup. Ct. Rep., 565, the Court held valid a Nebraska statute allowing a reasonable attorney's fee to a plaintiff in case of an unsuccessful defence by an insurance company of a suit on a policy of insurance covering real property wholly destroyed by fire. We quote the following from that case as a complete answer to the suggestion of inequality in the case at Bar in the classification of common carriers for special legislation of the kind in question, and the suggestion of inequality because the penalty falls upon the common carrier when unsuccessful in the suit, but not upon the claimant when he is unsuccessful in the suit. The Court said:

"All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defence of a suit to enforce certain insurance policies is repugnant to the equality clause of the 14th Amendment are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorney's fees is imposed
17 on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all

these propositions must rest on the assumption that contracts of insurance, generally considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may be supervened. But the unsoundness of these propositions is settled by the previous adjudications of this Court," citing cases.

The case of Missouri, Kansas & Texas R. R. Co. *vs.* May, 24 Sup. Ct. Rep., 638, is an interesting and striking case. In that case the Court held that a Texas statute, imposing a penalty in favor of contiguous land owners against railway companies for permitting Johnson grass or Russian thistle to mature and go to seed upon their road, does not deny such railway companies the equal protection of the law. It might be suggested that Johnson grass is a curse or a blessing according to the view point, a curse as to crops requiring clean cultivation, a blessing when hay is the thing wanted; or it might be suggested that Johnson grass could be easily communicated to the railway company's land or right of way by streams from bottom lands above; or that it might be propagated from seed dropped upon the ordinary public highways from wagons hauling such hay, thence to lands adjoining, thence to the railway
18 company's lands, thence to contiguous lands, but no such penalty applies against other carriers against those in charge of ordinary highways, against a contiguous land owner in favor of the railway company, or as between contiguous land owners. It will be further observed that the legislation effected the railway company in its capacity as owner or occupant of the land or right of way. But the Court was guided in the decision of the case by these sound principles.

"When a State legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the Courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts."

This Court in Simmons *vs.* Telegraph Co., 63 S. C., 63, held that the statute making telegraph companies liable for mental anguish is not violative of the 14th Amendment or Art. 1. Sec. 5, of the State Constitution, and in Johnson *vs.* Spartan Mills, 68 S. C., 355, this Court held that Sec. 2719, making it unlawful for any corporation, person or firm to issue, pay out or circulate for payment for the wages of labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, except upon conditions specified in the Act, did not violate the 14th Amendment and was upon a reasonable

classification, even though it contained a proviso that said section shall not apply to agricultural contracts or advances made for agricultural purposes.

In the case of Porter *vs.* Railway Co., 63 S. C., 169, this Court held that the act, 22 Stat., 443, imposing a penalty on com-
19 mon carriers for failure to pay or refuse to pay damages etc. to freight within sixty days, does not violate those sections of the State and Federal Constitutions providing for equal protection to all, this Court distinguishes that case from the Ellis case in two particulars, viz, (1) that the South Carolina statute of 1897 applied to all common carriers, while the Texas statute, condem-ed in the Ellis case, was limited to one class of common carriers, railway corporations. (2) That the South Carolina statute was limited to such claims as were peculiarly incident to the business of a common carrier, but the Texas statute was not so limited.

The statute considered in the Porter case was, in Johnson *vs.* Southern Ry., 69 S. C., 322, held to be repealed by the Act of 1903 which is now under consideration. But the principle decided in the Porter case is just as applicable in the present case. A valid distinction can not be based upon the difference between a requirement "to pay or refuse to pay" within a given time, as provided in the Act of 1897, and a requirement "to pay" within a given time, as required in the Act of 1903, for if it be unlawful to require the latter, under penalty, it must also be lawful to require the former, since no other person or class is required "to pay or refuse to pay," under penalty. The decision rests upon the reasonableness of the classification of common carriers for particular legislation with respect to the performance of their duty as such, thereby subserving an important public purpose within the police power of the State.

From this review of the decisions of the Supreme Court of the United States and of this Court we think it is clear that the statute is not unconstitutional.

The Respondent, in the event of the above conclusions being reached, has upon notice and excepti-ns taken asked that this Court consider whether the judgment of the Circuit Court should not be affirmed upon the ground that the Magistrate erred in finding judg-
ment for the penalty, when the testimony showed that the
20 claim filed by plaintiff for One and 75/100 Dollars was made up of two items, to wit: One and 50/100 Dollars, the value of the property alleged to have been lost or damaged while in possession of defendant, and 25c. freight paid by plaintiff for same. The Magistrate having found as a fact that the amount of the loss or damage was $1.75, as claimed, and this conclusion having been affirmed by the Circuit Court by sustaining the Magistrate's judgment to that extent, we have no power to review or reverse such conclusion of fact, unless there was absolutely no evidence tending to sustain it. It was shown that the cost of the bunch of bananas in Columbia, S. C., was $1.50 and the freight thereon to McBee, S. C., was 25c. This was certainly some evidence that the value of the bananas to plaintiffs at McBee was at least $1.75 and that such was

the amount of their loss. The Magistrate having adjudged the loss to be as claimed by plaintiffs, judgment for the penalty was proper.

The judgment of the Circuit Court is reversed and the judgment of the Magistrate Court is affirmed.

21 [Endorsed:] 6129. The State of South Carolina. In the Supreme Court, April Term, 1905. Seegers Brothers, Appel'ts, *v.* S. A. L. Railway, Resp'd't. Reversed. Opinion by Ira B. Jones, A. J. We concur. Eugene B. Gary, Presiding Justice. C. A. Woods, A. J. Report. Supreme Court of South Carolina. Clerk's Office. Columbia, S. C. Filed 13 Nov., 1905. U. R. Brooks, Clerk.

22 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

A. L. SEEGERS and W. B. SEEGERS, Partners in Business under the Firm Name of Seegers Bros., Plaintiffs, Appellants,
against
SEABOARD AIR LINE RAILWAY, Defendants, Respondent.

To the Honorable Y. J. Pope, Chief Justice of the Supreme Court of the State of South Carolina:

Now comes Seaboard Air Line Railway, the Defendant and Respondent of the above appeal, by its attorneys, Stevenson & Matheson and Edward McIver, complains and alleges that it is a citizen of the United States of America. That in the above entitled matter on the 13th day of November, 1905, final judgment was rendered against your petitioner by the Supreme Court of the State of South Carolina, that being the highest court of law or equity in the said State of South Carolina, wherein it was adjudged that the provisions of the Statute of South Carolina of 1903, being Act No. 50, page 81, of the Statutes of 1903, and Section 2 of said Act, which imposed a penalty upon railroad companies for failure to pay claim for loss or damage to property while in the possession of such common carrier within forty days after the filing of such claim with the agent of the common carrier at the point of destination, of $50.00 *was* constitutional and *was* not in violation or in conflict with the provisions of Section 1 of the 14th Amendment to the Federal Constitution in that the provisions of said Act did not deprive the said petitioner of the rights, privileges, or immunities secured to the other citizen- of the United States and of said State, nor of liberty of property, without due process of law, nor the equal protection of the law.

Wherefore your petitioner prays for the allowance of a writ
23 of error from the Supreme Court of the United States to the Supreme Court of the State of South Carolina and judges thereof to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected and

said judgment reversed and your petitioner discharged, and your petitioner will ever pray.

SEABOARD AIR LINE RAILWAY,
By STEVENSON & MATHESON,
Att'ys-at-Law and in Fact.
STEVENSON & MATHESON,
EDWARD McIVER,
Att'ys for S. A. L.
W. F. STEVENSON,
Att'y for S. A. L. Ry.

The writ of error, as prayed for in the foregoing petition, is hereby allowed this 20th day of November, A. D. 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $500 no/100. Dated at Newberry, this 20th day of November, A. D. 1905.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

24 [Endorsed:] South Carolina. In the Supreme Ct. Seegers Brothers *vs.* Seaboard Air Line Railway. Petition for writ of error, order allowing same, & assignment of errors. Stevenson & Matheson, Edward McIver, att'ys for defendant.

25 In the Supreme Court of the State of South Carolina.

A. L. SEEGERS and W. B. SEEGERS, Partners in Business under the Firm Name of Seegers Bros., Plaintiffs, Appellants,
against
SEABOARD AIR LINE RAILWAY, Defendant, Respondent.

Assignment of Errors for Supreme Court of the United States.

The Seaboard Air Line Railway, by its attorneys, Stevenson & Matheson and Edward McIver, respectfully submit that the Supreme Court of the State of South Carolina erred in its decision in the above entitled case—

1. In adjudging and deciding that Act No. 50, of the Acts of South Carolina of 1903, page 81, Section 2, which is as follows:

"That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing such claim with the agent of such carrier at the point of destination of such shipment; Provided, That no such claim shall be filed until after the arrival of the shipment or some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with in-

terest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing, to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction; Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; Provided, further, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of Section 1710, Vol. 1, of the Code of Laws of South Carolina, 1902."

is constitutional and is not in violation of Art. 14, Section 1, of Amendments of the United States Constitution whereas it should have held that said act was in violation of the constitution of the United States in that (*a*) it denies to common carriers the equal protection of the law in that it singles them out of all citizens and corporations and requires them to pay in certain cases a
26 penalty for failure to pay certain kinds of claims not imposed on any other corporation. (*b*) In that it deprives common carriers of the equal protection of the law in that it imposes a burden on their right to litigate claims in the courts not imposed on any other litigants. (*c*) In that it requires them to pay a penalty in case said carrier loses its case, while the adverse party is not subject to any such penalty in case he loses, thus denying equal access to and protection before the courts, whereas there is no proper or reasonable ground of distinction that would justify a classification such as to prevent their free access to the courts on equal terms with other litigants. (*d*) In that it imposes a penalty on common carriers for failure to pay a certain kind of debt in a specified time not imposed on any other debtor.

Whereas it is respectfully submitted that there is no proper basis for the classification which would impose a penalty upon a common carrier for failure to pay a debt in a specified time which is not imposed on any other debtor.

STEVENSON & MATHESON,
EDWARD McIVER,
Att'ys for S. A. L. Ry.

27 THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Carolina before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between A. L. Seegers and W. B. Seegers, doing business as Seegers Bros., and Seaboard Air Line Railway, wherein was drawn in question the validity of a statute of South Carolina on the ground of its being repugnant to the constitution and laws of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution of the United States a manifest error hath appeared to the great damage of the said Seaboard Air Line Railway, as by its complaint appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held *with* the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

28 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2 day of December, A. D. 1905.

C. J. MURPHY,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by
Y. J. POPE,
Chief Justice.

[Endorsed:] Writ of error. Copy.

29 THE UNITED STATES OF AMERICA:

To A. L. Seegers and W. B. Seegers, doing business under the name and style of Seegers Bros., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of South Carolina, wherein

Seaboard Air Line Railway is plaintiff in error and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to parties in that behalf.

Witness the honorable Y. J. Pope, Chief Justice of the Supreme Court of the State of South Carolina this 13 day of December, in the year of our Lord one thousand nine hundred and five.

Y. J. POPE, *Chief Justice.*
EDWARD McIVER,
STEVENSON & MATHESON,
W. F. STEVENSON,
Att'ys for S. A. L. Ry.

30 We hereby accept due service of *of* this citation December 13, 1905.

A. L. SEEGERS,
W. B. SEEGERS,
SEEGERS BROTHERS,
Defendants in Error.
W. P. POLLOCK,
Attorney for Defendants in Error.

[Endorsed:] Citation. Copy.

31 The State of South Carolina.

STATE OF SOUTH CAROLINA:

A. L. SEEGERS and W. B. SEEGERS, Partners in Business under the Firm Name of Seegers Bros., Plaintiffs, Defendants in Error,
against
SEABOARD AIR LINE RAILWAY, Defendant, Plaintiff in Error.

Know all men by these presents that we, Seaboard Air Line Railway, as principal, and American Surety Company, of New York, as surety, are held and firmly bound unto A. L. Seegers and W. B. Seegers, partners in business under the firm name of Seegers Bros., in the sum of One Thousand ($1,000) Dollars to be paid to the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 25th day of November, A. D. 1905.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in above entitled action by the Supreme Court of the State of South Carolina. Now therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect an- answer *or* costs and dam-

ages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] SEABOARD AIR LINE RAILWAY,
By M. B. SMITH, *Agent*, [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By MARION F. JACKSON,
Resident Vice President.

Attest:
J. T. ORME, *Resident Assistant Secretary.*

Signed, sealed and delivered in the presence of
D. S. MATHESON.

32 STATE OF SOUTH CAROLINA, *County of Chesterfield:*

On this 25th day of November, A. D. 1905, before me personally appeared M. B. Smith, Agent for the Seaboard Air Line Railway, in above State and County, known by me to be such person and such agent described in and who executed the foregoing bond and acknowledged that he executed the same of his free act and deed.

D. S. MATHESON,
Notary Public of South Carolina,
Chesterfield County.

STATE OF GEORGIA, *County of Fulton:*

On this 27 day of November, A. D. 1905, personally appeared before me Jos. T. Orme, who being duly sworn, deposes and says, that he is the member of a local board of directors for the American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal *to* said corporation, and that said instrument was signed and sealed on behalf of the said corporation by authority of its board of directors, and that the said Jos. T. Orme acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

W. G. LEAS,
Notary Public of Fulton County, Georgia.
J. T. ORME.

I hereby approve the foregoing bond and sureties this 20 day of November, 1905.

[Seal Supreme Court of South Carolina.]

Y. J. POPE,
Chief Justice of the Supreme Court
of the State of South Carolina.

A true copy,
U. R. BROOKS, *Clerk.*

[Endorsed:] Seegers Bros. *vs.* S. A. L. Appeal & supersedeas bond. 30 Nov.

33 SOUTH CAROLINA, *Chesterfield County:*

In the Supreme Court.

A. L. SEEGERS and W. B. SEEGERS, Partners in Trade under the Name and Style of Seegers Bros.,

vs.

SEABOARD AIR LINE RAILWAY.

I hereby certify that the foregoing is a true transcript of the record in this case as completed, and also that the opinion of the Supreme Court in the said case attached is a correct copy of the opinion rendered.

Witness my hand and the seal of the Supreme Court of South Carolina December 13th, 1905.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

34 [Endorsed:] Supreme Court of the United States, October term, 1906. Seaboard Air Line Railway, plaintiff in error, *vs.* A. L. Seegers & W. B. Seegers, doing business as Seegers Brothers, defendants in error. Transcript of record from Supreme Court of South Carolina. W. F. Stevenson, Att'y for Pl'ff in Error.

Endorsed on cover: File No. 20,022. South Carolina supreme court. Term No. 171. Seaboard Air Line Railway, plaintiff in error, *vs.* A. L. Seegers and W. B. Seegers, doing business as Seegers Bros. Filed December 22d, 1905. File No. 20,022.

Office Supreme Court, U. S.
FILED.
OCT 7 1907
JAMES H. McKENNEY,
CLERK.

No. 15.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

[redacted].

SEABOARD AIR LINE RAILWAY
PLAINTIFF IN ERROR.

VS.

A. L. SEEGERS AND W. B. SEEGERS,
DOING BUSINESS AS SEEGERS BROS.
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

ARGUMENT OF ATTORNEYS FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 171.

SEABOARD AIR LINE RAILWAY
PLAINTIFF IN ERROR.

VS.

A. L. SEEGERS AND W. B. SEEGERS,
DOING BUSINESS AS SEEGERS BROS.
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

ARGUMENT OF ATTORNEYS FOR PLAINTIFF IN ERROR.

The Defendant in error brought their suit in a Magistrates Court against Plaintiff in error for $1.75 the value of a bunch of bananas of the original cost of $1.50 and twenty-five cents freight paid on same and for $50 penalty for failure to adjust and pay the same in forty-days after claim filed. (folios 1 and 2) It appeared that part of the bananas had been delivered to consignees but were returned on finding that part of them were missing (folio 2.) The Railroad Company after the forty-days expired offered to pay the claim aud freight but same was refused (folio 2.) The case was tried before a Magistrate who gave judgement for the full amount of the claim and

penalty (folio 3) and the Railway Company appealed to the Circuit Court on the grounds set out in the record (folios 3 and 4.) The Circuit Judge reversed the Magistrate as to the penalty on the ground of the unconstitutionality of the Statute, his judgement being found in folios 5 and 6. The Claimants appealed to the Supreme Court of the State of South Carolina which reversed the Circuit Court as to that position (folios 8-20 inclusive.) Thereupon the Railway Company applied for and obtained a writ of error and brought the record to this Court for review. The Statute under consideration and under which the penalty was imposed is as follows:

AN ACT TO REGULATE THE MANNER IN WHICH COMMON CARRIERS DOING BUSINESS IN THIS STATE SHALL ADJUST FREIGHT CHARGES AND CLAIMS FOR LOSS OR OF DAMAGE TO FREIGHT.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That from and after the passage of this Act, all common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading: *Provided*, The rate therein stipulated be in conformity with the classifications and rates made and filed with the Inter-State Commerce Commission, in case of shipments from without this State, and with those of the Railroad Commissioners of this State, in case of shipments wholly within this State; by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment or tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications and rates, such common carrier shall deliver the freight in question to

the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any Court of competent jurisdiction.

SEC. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: *Provided*, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction: *Provided*, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: *Provided, further*, That no common carrier shall be liable under this Act for property which never came into its possession, if it complies with the provisions of Section 1710, Vol. 1, of the Code of Laws of South Carolina, 1902.

Section two is the vital section in this case. Plaintiff in error contends that said Act is in violation of the constitution of the United States in that (*a*) it

denies to common carriers the equal protection of the law in that it singles them out of all citizens and corporations and requires them to pay in certain cases a penalty for failure to pay certain kinds of claims not imposed on any other corporation. (*b*) In that it deprives common carriers of the equal protection of the law in that it imposes a burden on their right to litigate claims in the courts not imposed on any other litigants. (*c*) In that it requires them to pay a penalty in case said carrier loses its case, while the adverse party is not subject to any such penalty in case he loses, thus denying equal access to and protection before the courts, whereas there is no proper or reasonable ground of distinction that would justify a classification such as to prevent their free access to the courts on equal terms with other litigants. (*d*) In that it imposes a penalty on common carriers for failure to pay a certain kind of debt in a specified time not imposed on any other debtor.

ARGUMENT.

The present case is a shining illustration of the iniquity of the legislation. A Claimant entitled to $1.75 is offered his money and declines it because the offer was forty-two days after claim filed instead of forty days and demands fifty dollars penalty for the two days excess time, twenty-nine times the amount of his claim or 2900 per cent. This was visited on the Company because it litigated and if it had succeed in defeating the claim or any part thereof no penalty, attorney's fee or other liability than the cost would fall on the Claimant. The Statute doesn't close the door to the litigation but it says to the Claimant, "go in and win if you can and if you establish your claim in full the Defendant must pay you a penalty for its temerity in litigating of 2900 per cent, of your claim, if you fail to establish your claim in full you will still get the costs and not be liable to any penalty. If you fail utterly you have only the costs to pay, there is no penalty against you.

If, however, you owe the railroad company for freight earned in the relation of common carrier or demurrage or damage for getting possession of freight shipped to "order notify" by deceit and without taking up the draft and bill of lading you can stand pat and litigate. If you lose you cannot be made to pay a penalty. The costs alone are chargeable to you.

We will deal with the questions as follows:

1st. Are Carriers discriminated against as between them and other debtors of the same class. 2nd. Are they denied access to the Courts on equal terms with with other litigants. 3rd. Do the cases cited by the Supreme Court of South Carolina sustain its position?

First. The Statute in question was designed to regulate the relations and respective rights of three parties to Commerce. The Consignor, the Carrier and the Consignee. Commerce and its regulation is now one of the great complex problems of the day and the relations of the three parties above designated are the the source of constant consideration. The relation is contractual and owing to the public nature of the duties of the Carrier, these relations are susceptible of and subject to police regulation and this regulation sweeps the entire field dealing with all three and necessarily so for the reason that they are undissolubly bound together by the contract of Carriage and must be dealt with equally so that no advantage be given one over the other nor shall any advantage be given to the one of them over his or its competitor. Out of this relation there grow mutual claims which must be dealt with as between themselves and by the courts in case of disagreement.

There are claims against the Carrier for, 1st. Loss and damage to freight, 2nd. For overcharge. There are claims against Consignors and Consignees, 1st. For freight charges, 2nd. For demurrage, 3rd. For balance due for undercharges where the Consignor has classified it in a class carrying a lower rate than

its true class and where the rate named in the bill of lading is erroneously laid and the Carrier is required to settle that rate and deliver the goods and seek relief in litigation as is now required in South Carolina and 4th. For goods consigned "order notify" when they are obtained from the company without production of the bill of lading on misrepresentations, leaving the Carrier to pay for the goods to the shipper and get his money out of the person so receiving them and this is of frequent occurrence. The Statute under discussion does not deal with Common Carriers in all their relations with the public but only with them in this relation to Commerce in the persons of Shipper and Consignee. Now in dealing with those relations is it conceivable that the Legislature can discriminate as between the parties? Can they give a penalty to the Consignee when he sues the Carrier, of 2900 per cent. of his claim when they refuse to allow a penalty to the Carrier against the Consignee where by collusion between the Consignor and Consignee, in violation of right and honesty they have classified the goods wrongfully and owe a balance on freight which the Carrier must collect by suit, or where the Consignee fraudently gets possession of goods which the company has to pay for to the Consignor (who could get the penalty if he was not paid in 40 days)? Doesn't this illustration show the gross denial of equal protection of the laws of this act? The Consignor ships goods "order notify" from Columbia to Charleston, the party to be notified having information that they are coming, by reason of his standing and by collusion with some agent of the Carrier, gets the goods without taking up the bill lading. The shipper makes demand on the Carrier for the goods and if not paid collects for the same with $50 penalty. The Carrier demands the money of the party receiving the goods and has to sue for them. No length of waiting, delay, or vexation will give the Carrier the right to a penalty against the wrongdoer. It will recover the money only. Again, a shipper procures an

agent by mistake to insert a rate in the bill of lading *far* below the proper rate and on arrival in Charleston the railroad is required to deliver the goods on tender of that amount, and either lose the balance or sue for it and in the end gets its money but no penalty, but if there is a shortage of a pair of socks worth 25 cents in the shipment and the Consignee can demand payment and the Carrier must pay in 40 days regardless of whether it has been able to ascertain whether they were ever delivered to it in the first instance or not or be subject to a penalty of $50 for not doing so. This is the whole scheme of the law of South Carolina. In dealing with this class of people engaged in a common undertaking with reciprocal duties to each other they allow two members of the class to go free regardless of their wrongdoing and inflict a heavy penalty on the third member in their favor. It is like the laws imposing heavy penalties on the laborer for violating a contract to labor and imposing none on the employer, held to be unconstitutional in State vs. Williams, 32 S. C., 125, cited below:

These three people are all debtors of a certain class ,o wit: A class made up of those who became debtors to each other from the mutual relations and duties existing from their engagements in commerce in handling of commodities. If they are not all in that class why not? They have been so recognized by the State in their legislation and by the United States in its far reaching legislation in regulation of interstate commerce in which the principle is fully recognized that they are all bound in the same bundle and all to be held in check with heavy penalties. Our assignments of errors cover this point and there is no adequate answer to it in the opinion of the Supreme Court of South Carolina. They merely say that the classification of common carriers is a good classification. We grant that for purposes of certain legislation but the classification must be reasonable and adpated to the end in view and based on a distinction between the Carriers and all other per-

sons as to the matter regulated. Here we have tried to show that the matters reported were collection of debts growing out of shipments of freight in which claims of a similar nature arose against all parties to the contract of shipment, and therefore all parties were in *one class* as to the subject matter being regulated and penalties were visited only upon one of the parties to the class and he was denied the equal protection of the law in that particular case. Now as to the authorities. All agree that individuals of the same class must be treated alike, the difficulty being determination of the identity of the members of a class.

We cite here: The State vs. Williams, 32 S. C., at page 125. Here the State had passed an act making it a misdemeanor for a laborer on a farm under contract duly entered into to violate the same and also made it a misdemeanor for the employer to violate the contract but fixing a limitto the punishment for the employer and no limit to that that of the laborer. The Court say "We think there was error in over-"ruling the demurrer; for the discrimination in the "punishment which may be imposed, under provis-"ions of Section 2084 of the General Statutes, or be-"tween the laborer and the landholder renders the "act clearly unconstitutional." Now they belonged to different classes. Landlord and laborers and legislation affecting each in a relation not common to both might be discriminative, but legislation touching them on a common point and in their class as parties to agricultural contracts must make them equal before the law or be void. So here the Railroad Company is only one party to the compact, only one of the individuals making up the class dealing in transportation of goods, wares and merchandise and if any discrimination is made against one member of a class in favor of another it cannot stand.

This is an attempt to make a common carrier pay one class of debts growing out of transportation under penalties and forfeitures that are not inflicted

on other people, even other debts as before said growing out of the same relation. The title of the act shows its partisan character and that it was leveled at one party to the contract of transportation.

It in effect says to a common carrier 'you must pay all claims made against you for loss of or damage to goods shipped over your lines in this State within forty days after claim filed, or be subjected to a penalty of fifty dollars.' What for? For a failure to pay its debt for forty daysl What individual or other corporation is thus punished? Is not this an arbitrary classification and discrimination against common carriers? The Courts are not open to them as to other litigants to adjudicate such claims, the law says to them 'if you lose your case, you will be subject to a heavy penalty, (in this case nearly thirty times as large as the claim in controversy,) if your adversary loses his case he has no penalty to pay.' Is not this unjust discrimination? Corporations are the same as persons within the provisions both of the State and the United States Constitutions.

"A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, and case there cited.

I frankly admit that the Legislature has the power to classify persons or corporations, yet it is equally true that such classification cannot be made arbitrarily. Classification for legislative purposes must have some reasonable basis upon which to stand.

"The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations." Ibid.

The State cannot say, for instance, that all farmers or persons engaged in the cultivation of the soil, must pay their debts contracted for the raising of their crops or the purchase of their farming imple-

ments, within a given length of time, or be subjected to a penalty not imposed on other debtors; and yet there would be as much propriety in doing this as there is in putting a penalty on common carriers for not paying their debts incident to the running of their business.

"Clear and hostile discrimination against particular persons and classes" cannot be made.

Bells Gap R. R. vs. Pa., 14s U. S., 232.

Here, it is submitted, is a clear, and I might perhaps add hostile, discrimination against common carriers, requiring them to pay their debts within a given time, or suffer a heavy penalty, imposed on no one else, even though the conditions be identical.

Such classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Porter vs. Ry., 63 S. C., 180, quoting from Gulf, C. & S. F. Ry. vs. Ellis, supra.

It is conceded that for some things common carriers might very properly be classified and distinguished from persons, and even from other corporations; as for instance when the nature of the business engaged in is of a peculiarly dangerous character, the legislature in the exercise of its police powers may justly require many things to be done by them, not required of others. But it is earnestly contended that this can never be done in reference to their liability for the payment of their debts, and that no law can properly be made requiring them to pay their debts under greater penalties than are imposed on others, or putting a greater burden on their right to litigate claims against them, than is imposed on others. Where is the "distinctive difference between the business of a common carrier and any other class of persons" (Porter vs. Ry. Co., 63 S. C., 180,) in so far as the payment of its debts

is concerned? Of course there are marked distinctions between the kind of business carried on by a common carrier and other classes of business, and in many particulars no doubt provisions of the law may be properly made to apply to common carriers that need not apply to other kinds of business; duties arising out of the peculiar nature of the business in which they are engaged, and not resting alike on other kinds of business, may properly be imposed on them, but surely there is no difference in their obligation to pay their debts, from that of any other debtor; and surely they should have the same free right to litigate as others have, else, it is respectfully submitted, a blow is struck at the very foundation of justice, as administered by the Courts.

As is said in Gulf, C. & S. F. Ry. vs. Ellis, supra, "A statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carriers with it no special necessity for the prompt payment of debts. This is a duty resting upon all debtors; and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. * * It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency."

I have quoted extensively from this case and I hope I may be pardoned for even further quotations, as this case is very much like the case under consideration.

The Supreme Court of the United States in this case—Gulf, C. & S. F. Ry. vs. Ellis—construed and held unconstitutional, a Texas statute very much like the one under consideration, and the well considered opinion of Mr. Justice Brewer, is so much in point here that I might well adopt his opinion in toto as my argument in this case. The question in that case was as to the constitutionality of an act of

the State of Texas providing that railroad Companies failing to pay certain claims of less thrn fifty dollars for thirty days after presentation, should be liable for an attorney's fee, not exceeding ten dollars. In holding the act unconstitutional, Mr. Justice Brewer, speaking for the Court, says: The Supreme of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debt. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the Courts, as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys fees of the saccessful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished not only when adjudged to be in the wrong. They do recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvisous from a mere inspection of the seatute."

Change "attorney's fees" to "penalty," wherever it occurs, and the above is so applicable to this case, that it might well have been written for this case.

The learned Justice goes on to say—"It is, of course, proper that every debtor should pay his debts and there might be no impropriety in giving to every successful suitor attorney's fees. Such provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a dis-

tinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, and some reason why the duty of payment is more imperative in the one instance than in the other.

If it is said that this penalty is cast only upon corporations, and to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations (here only common carriers of all corporations) are selected to bear this penalty. The rule of equity is ignored."

Again, he goes on to say: "Neither can it be sustained as a proper means of enforcing the payment of small debts. and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the Legislature may arbitrarily select one corporation, or one class of corporations, one individual, or one class of individuals, and visit a penalty on them which is not imposed on others guilty of like delinquency, this statute cannot be sustained. Arbitrary selection can never be justified by calling it classification."

Similar statutes in the States of Alabama, Mississippi, Michigan, Arkansas, Nebraska, Illinois and

West Virginia have beeu held unconstitutional.

Railroad Co. vs. Morris, 65 Ala., 193.
Railroad Co. vs. Moss, 60 Miss., 641.
Wilder vs. Railroad Co., 70 Mich., 382.
Railroad Co. vs. Williams, 49 Ark., 492.
Railroad Co. vs. Baty, 6 Neb. 37.
Frorer vs. People, 141 Ill., 171.
Braceville Coal Co. vs. People, 147 Ill., 66.

In Wilder vs. Railroad Co., supra, the Court on page 384 says:

"Corporations have equal rights with natural persons as far as their privileges in the Courts are concerned. They can sue and defend in all Courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This Statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25.00, if it fails to successfully main its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad can recover only the ordinary statuary costs of $10 in the justice's Court; but, if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an "attorney fee" does not change its real nature or effect. It is a punishment to the company, a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm

him with special and important pecuniary advantages over his antagonist."

This is the view taken by the Michigan Court on such legislation as we are now considering, and while this case has no binding force on this Court, we submit that the reasoning is sound and unanswerable, and in exact accord with the decisions of the Supreme Court of the United States.

In Durkee vs. City of Janesville, 28 Wis. 464, the Court uses this language: "It is obvious there can be no certain remedy in the laws where the legislature may prescribe one rule for one suitor, or class of suitors in the Courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it; thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision."

The act in question is directed against all common carriers while the Texas act, construed by the Supreme Court of tne United Statea, in Gulf, C. & S. F. Ry. vs. Ellis, is directed against railroad companies only. But it is evident from a careful reading of the case that the reasoning of the Court and the authorities cited, apply just as forcibly to our act as to the Texas act. Indeed the words 'common carriers' might be substituted for the words 'railroad companies,' wherever they occur in the opinion, without in any respect impairing the force of the argument.

Our Supreme Court in Porter vs. Railway Co. 63 S. C. 169, has held section 1711 Code of Laws, Vol. 1, constitutional. That section, since repealed by the act now under consideration, (see Johnson vs.

So. Ry. 69 S. C. 322,) required common carriers "to pay for or refuse to pay for all loss" &c., and the Court in holding it constitutional uses the following language: "We are of opinion that our act of 1897 was passed not for the purpose of enforcing more speedy payment of claims against common carriers, but for the purpose of enforcing more prompt action on the part of common carriers, in passing upon the validity of claims presented against them, and that the time allowed by the act--sixty days--after presentation of any claim is reasonable and sufficient to afford an opportunity to investigate the propriety and legality of the claim." It is true the Court also goes on to distinguish between the statute of Texas, held unconstitutional in Gulf, C. & S. F. Ry. vs. Ellis, and our act then under consideration, on the further ground that the Texas act was directed against Railroad Companies, while our act was directed against common carriers, but the reasoning in the Gulf, C. & S. F. Ry. case will not bear this distinction, as will be most apparant from a careful reading of that case. This too was obiter dictum, as the dicision was properly put on the ground that our act, then under consideration, did not impose a penalty for failure to pay, but for failure to act, to investigate and accept or refuse the claim. That act merely required common carriers to pay or refuse to pay—it merely required them to act, here the act under consideration requires them to pay, or to take the penalty. A marked distinction we submit, bringing this case directly under the ruling in the Gulf, C. & S. F. Ry. case.

The second and more more serious aspect is the denial of equal standing before the courts now to be discussed.

Second.

The Statute is designed to make the Carrier pay claims promptly. It provides specifically that an unsuccessful litigation as to a claim shall be visited

by a penalty if it is not ended and the debt paid before 40 days expires. It does not provide that the consignee must sue in time to have the case tried in time to pay the claim within the 40 days if it is adjudged against the carrier and there is no way that the carrier, if it believes the claim to be unjust, can get an adjudication of the claim in time to pay it and save the penalty if it is adjudged to be just, and the result is that in the large majority of cases like the present rather than risk the confiscating penalty of 2900 per cent they are forced to pay the claim right or wrong. But the Court of South Carolina says it is designed to require the prompt payment of just claims. If you make the conditions of entering the courts to ascertain what claims are just, and what are not, so onerous on one litigant and so easy on the other party to the same contract, the party on whom the burden is placed is discriminated against and they are both in the same plight, are both standing on the contract to transport and safely deliver, by the carrier, for a consideration paid by the consignee and should both be treated alike. But they are not. The courts which were established in recognition of the fact that there are differences as to property rights, as to "just claims" which should be settled by an unbiased tribunal are free and open to one party to the contract without liability to penalty if he declines to pay and litigates while to the other party the door is barred by a confiscatory penalty. A right guaranteed to him is practically taken away by the burden imposed as a condition to its assertion unless he makes good his contention. And again; the right is denied him to be equal with the other party to the litigation in that he cannot get his right submitted to a court in time to decide it, in the 40 days. He can't require the claimant to bring his suit in 40 days or be barred of the penalty and naturally the claimant waits till the time expires. To put them on an equal footing in this respect the claimant should be required to bring his suit so as to get an adjudication in the time allowed to pay

without penalty or be barred the penalty. So the Legislature has attempted to so regulate matters growing out of the contractural relation of cdrrier and consignee to make the carrier either submit to wrong or litigate at great disadvantage with the shipper, who is not required to pay any penalty growing out of his failure to pay any liability growing out of his contract nor allowed to proceed so as to determine the rights of the carrier in time to pay his liabilities without penalty. Classify them therefore as mutual contraetors as to shipment, transportation, and receipt of freight and one is given, plain and unconscionable advantage over the other; class them as litigants and one is given confiscatory power over the other without any reciprocal liability and class them as debtors, of the peculiar class made up of carriers and consignees and the door of the court is closed to the one by the enormous advantage given the other without any reciprocal disadvantage. Is this allowable under our Constitution?

We would repeat that the classification must be with reference to the matter and relation dealt with? It is known that all railroads own more or less real estate. Would it be permissible to pass an Act that where a common carrier failed to return its land for taxation it should be taxed on double its value, while the individual landowner in default should be taxed be taxed on only 5 per cent additional valuation? That would not stand a minute, simply because the classification of the railroad as a common carrier has no relation to the subject regulated, It is the class of landowners. Suppose it went further and denied the right of common carriers to go into court to correct the assessment on its property and left the courts open to all other taxpayers for that purpose. Would this not be denying the equal protection of the law and denying equal access to the courts? Would the fact that the R. R. Co. was classed as a common carrier have any thing to do with it? Can, therefore, the State say that two parties can enter into a contract, that if one party fails to carry his part

out, he can refuse to pay and stand a suit and if he looses he is not liable to any penalty except for costs. But if the other party fails and appeals to the court and looses he shall be liable to a penalty in favor of his co-contractor. Doesn't that deny equality before the courts and do not the courts exist for affording the protection of the law and therefore does not denial of equality before the court deny equal protection of the law?

AUTHORITY.

We cite now the case of Cotting vs. Kansas City Stock Yards Co., 183 U. S. p. 79.

"Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the Courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense.

Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no

penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?

Take still another illustration: Suppose a law which, while opening the doors of the Courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the Courts to a particular litigant) which places upon him as a penalty for a failure to make good his defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to the denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas their statute makes certain conduct by the Stock Yards Company a criminal offense, and simply imposes punishment for such offense."

Mr. Justice Brewer puts his finger on the vital spot when he says that a Statute that imposed a heavy penalty if a corporation failed to make good its defense and "no penalty of any kind except a "matter of costs was attached to like failures of other "litigants, could it be said the corporations received "the equal protection of the law?"

This covers our case. It fits State vs. Williams 32 S. C. supra.

We cite at length Davidson vs. Jennings, 48 L. R. A. 340 and case cited therein.

"Counsel for appellants contend that the judgment and decree are erroneous, in that the lien decreed against the property of appellants includes in addition to the principal and interest of the debt, and the usual costs, the allowance af attorney's fees to the respective lien claimants. These allowance were made in pusuance of Par. 18, chap. 117, p. 375, Sess. Laws, 1893, which reads as follows: "In all suits for the foreclosure of liens, provided for in this act in which the plaintiff shall obtain a judgment and decree of foreclosure against the property described in said lien there shall be taxed as costs, in addition to the costs already provided for in such cases, a reasonable sum as an attorney fee to be fixed by the court at the time of rendering such judgment and decree." It will be seen that this section imposes a penalty upon the defendannt for exercising, in this class of cases, the common rights of making a defense, which is accorded to every other litigants of the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious. As furnishing support for this character of legislation, we are referred to the following cases, wherein statutes allowing an attorney's fee to plaintiff in actions against railroad companies for the killing of stock have been held to be constitutional: Peoria D. & E. E. Co. vs. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Kansas P. R. Co. vs. Mower, 16 Kan. 573; Perkins vs. St. Louis, I. M. & S. R. Co. 103 Mo. 52; 11 L. R. A. 426, 15 S. W. 320; Burlington, C. R. & N. R. Co. vs. Bey, 82 Iowa, 312 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. An examination of these cases discloses that the statutes there under consideration required the railroad company to fence its right of way, and provided penalties for the nonperformance of this statutory duty,—among them, an attorney's fee,—but no such reason underlies the legislation in in question. The attorney's fee allowed by the foregoing provisions of our statute is not in the nature

of a penalty for the voiolation of any statutory duty, but a punishment for the failure to pay the claim of the lienor, and cannot be sustained upon the principles announced in those cases. Its validity, therefore, depends upon whether it violates any provision of our Constitution. Section 6 of our Bill of Rights enacts: "The courts of Justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character; and that right and justice should be administered without sale, denial or delay." In Durkeville vs. Janesville, 28 Wis. 464, 9 Am. Rep. 500, an act that exempted the city of Janesville from the payment of costs in any action brought against it to set aside any any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with Par. 9, Art. 1, of the Constitution of Wisconsin, which was substantially like the foregoing section of our bill of rights. Chief Justice Dixon, in discussing the construction and effect to be given to that provision, said; "It is obvious there can be no certain remedy to the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others in like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination, they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and and spirit of this provision. Certainty of remedy implies uniformity of remedy and equality of rights and privilege in all things respecting it, which can only be obtained by general laws, equally binding upon every member in the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all." In South and North Ala. R. Co. vs. Morris,

65 Ala. 193, a statute which imposed upon an unsuccessful appellant a reasonable attorney fee incurred by reason of taking an appeal from a decision rendered by a justice of the peace in a suit against railrailroad companies for damage to live stock, notwithstanding it gave the same right to both parties, was held to be in conflict with the 14th Amendment to the Constitution of the United States and Par. 14 of their Bill of Rights, which is identical with par. 6 of ours. It is there said: "The clear legal effect of these provisions is to place all persons, natural and corporaate as near as practicable, upon a basis of equality in the enforcement, and defense of their rights in courts of justice in this State, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, whan it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions."

In Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss., 641. a similar statute was adjudged unconstitutional, the court saying: "The right of appeal cannot be fettered and clogged with reference to the parties litigant, or the attitude they occupy as plaintiff or defendant. All litigants whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering

it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances."

In Wilder v. Chicago & W. M. R. Co., 70 Mich., 382, 38 N. W., 289, the court in discussing the question, says: "This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

In Randolph v. Builders' and Planters Supply Co., 106 Ala., 501, 17 So., 721, the provision allowing attorney's fee was held to be in violation of par. 14 of their Bill of Rights which, as above stated, is identical with par. 6 of ours, "in that it allows a fee to the plaintiff's attorney for prosecuting his suit successfully, whereas a like fee is not allowed the defendants attorney in case the plaintiff fails in his suit, and on that account it is discriminative and class legislation."

It is difficult to see how the designation of such fee as "costs" obviates the objection that it confers upon the plaintiff a right that is denied to defendant, and that it is an "attempt to grant special privileges and advantages to one class of litigants at the expense and to the detriment of another." * * * *

It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not.

These Citations strongly fortify our position and answer the position of the Supreme Court of South Carolina that the penalty is designed to enforce

prompt payment of just claims. The intention may be good but the result of the Statute is to take away from the corporation the right to have a legal determination of the question whether the debt is just or not.

It puts to flight the idea that two parties engaged in litigation can be so placed by a Statute that one has an advantage over the other without the Statute being void for violation of the Constitution. We cite as appropriate to this point C. Y. C. Vol. 8, 1139, as follows: "In the absence of special cir-"cumstances, however, all litigants, whether plain-"tiffs or defendants should be considered equal before "the law, and a regulation operating wholly in favor "of one of the parties, would not be a reasonable "regulation."

But it may be said that this is fixing a penalty for non-payment of claims promptly and not imposing it for litigation. The Supreme Court of South Carolina has held otherwise. In the case of Best vs. Railway, 72 S. C., 483, the Court held that when the claim was paid and accepted after the time limit for the penalty had expired, that the penalty could not be recovered. That the penalty only applied where the claim was litigated, and was designed to operate as a "*deterrant of the Carrier in refusing to set-*"*tle just claims and as compensation of the Claimant for* "*the trouble and expense of the suit.*"

We cite the case as follows: "We concur, however, in the view of the Circuit Court that under the act of February 23, 1903, 24 Stat., 81, an action cannot be maintained for a penalty alone, after a settlement for loss or damage before suit. The Statute being penal should receive such strict construction as would not defeat the obvious intent of the legislature."

The act expressly provides: "Failure to adjust and pay such claim within the periods respectively herein prescribed, shall subject each common car-

rier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any Court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage, with interest as aforesaid."

"It seems that the plain meaning of the Statute is to make recovery of the amount claimed in a Court of competent jurisdiction a condition precedent to a recovery of the penalty, as the Statute expressly says that no penalty shall be recovered unless the consignee recover the full amount claimed in such action. The term "recover," when considered by itself, is not the usual or apt word to indicate a voluntary payment or receipt of money for damages suffered but ordinarily means the obtaining in a suit of a right to something by a verdict and judgment of a court, and that this is the meaning in the present statute is manifest by the context, "recover in such action." The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably *prompt settlement of all proper claims*, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.

It is true that the statute authorizes a suit for the penalty in the same action for the loss or damage, but that is very far from saying that the penalty is not dependant upon the recovery of the claim by action in court. Doubtless the Act provided for such a joinder mainly because the recovery of the penalty "is dependent upon recovery at law of the claim."

So no penalty can be recovered unless the claim is

litigated and the penalty is litigated and the penalty is to deter the railroad from litigating just claims and compensate the claimants for having the suit. This means that the penalty is imposed to prevent freedom of access to the courts by the railroad company and compensate the consignee for his trouble in court, and inasmuch as no penalty is fixed against the consignee who sues on a bogus claim in case he fails to establish his claim, a distinct discrimination is made in his favor, *He is compensated when right and not punished when wrong, while his antegonist is punished when wrong and not compensated when right.*

Can it be said that these litigants, then, are on equal footing before the Court? Is the law equal when the two parties to the same litigation are placed before the Court unequally, regardless of any classification? Doesn't it deny to the Railroad Company the right to have legally determined the justice of the claims; deterring it directly from entering Court—which is established for the sole purpose of settling such disputes?

This is the construction placed upon the act by our own Court and that settles its meaning.

Third.

We will now notice the case relied on by the Supreme Court of South Carolina. The first is the case of Atchison, Topeka & Sante Fe R. R. Co. vs. Matthews, 174, U. S. 96. The Court says "there "is no good reason why railroad corporations alone "should be punished for not paying their debts. "Compelling payment of debts is not a police regu- "lation. * * The purpose of this Statute is, not "to compel the payment of debts, but to secure the "utmost care on the part of railroad companies to "prevent the escape of fire from their moving "trains." 174 U. S. page 98. We will say that this is and always has been a matter of police regulation and penalty for violating laws for prevention of fires have always been imposed but the act under

discussion in this case is not a police regulation but is held by our own Supreme Court to be "designed "to bring about a reasonably prompt settlement of "all proper claims" (which grow out of a certain class of contracts) and to re-emburse the Claimant "for the trouble and expense of the suit."

This is held by the very case relied on above not to be a police regulation and therefore inadmissible.

Further, in distinguishing between the Matthews case and the Ellis case at page 100 of 174 U. S., the Court says "so that, according to the interpetation "placed upon the Texas Statute by its own Supreme "Court, its purpose was generally to compel the pay- "ment of small debts" * * * while on the other "hand, the purpose of this Statute is, as declared by "the Supreme Court of Kansas, protection against "fire--a matter in the nature of a police regulation."

The distinction then between the Matthews case and the case at bar is drawn by this Court clearly for the State Supreme Court says that this law is designed to compel the prompt payment of certain debts and is not a penalty for disregarding some police regulation. The reasoning of the Matthews case is all on our side and even there the Court says at page 105 that the Statute there under discussion is "near the line of separation." If that be so the Statute here is over the line, and arbitrary.

The next case cited is that of Erb. Receiver v. Monarch 177 U. S., 584. That is a case where the railroads were limited as to speed in a city and the question was made that a dummy line was excepted from the ordinance and therefore the equal protection of the law was denied. The Court held that the classification was proper and bore a reasonable relation to matter under regulation to wit: the safety of the public from fast trains in the city. Now that case bears no relation to this. That was a matter of police regulation. This is a regulation of suits growing out of violation of contract giving one party to

the suit an advantage over the other in results. The cases are not parallel.

The next case is Fidelity Mut. L. Association vs. Mettler, 185 U. S., 308. This case was a suit against the Life Insurance Co. for insurance in which damages were allowed of 12 per cent. and reasonable attorney's fee if the company lost. This was part of the condition of allowing Insurance Companies to do do business in Texas and that was the ground on which it was sustained—the Court saying; "this "particular liability amounted to one of the condit-"ions on which life and health companies were to do "business in Texas and the power of the State in the "matter of the imposition of conditions on its own "and foreign corporations has been repeatedly recog-"nized by this Court." The case is decided on that point. All that is said as to the point under discussion here is *obiter* and nothing is said except that if the constitutional question were open the reasoning in the Mathews case would conclude the same. No authoritative discussiion is made of the same. The case of Iowa L. I. Co. vs. Lewis, 187 U. S., 335 merely refers to the case of Mettler as conclusive of this, both being Texas cases and says the "reasoning" of that case is satisfactory. Since there was no "reasoning" in that case under the point heere being considered they must have referred to the conclusion that the States conditions precedent to doing business conluded the Insurance Co.

In Farmers and Merchants Ins. Co. vs. Dobney, 189 U. S., 301, the Court follows the other cases and also decides that insurance contracts can be classified alone and that there was no reason, when once classified, that different regulations should not be made to apply to them. This is not disputed here, but in this case the contract of shipment may be classified and has been and the State steps in and attempts to penalize one of the parties to the contract for a violation of it while it does not penalize the others violation. After classifying the

contracts it undertakes to discriminate against the parties to the same and attempts to bulldoze one of the parties from standing on its rights before the Court. This question has not been decided in any of the above cases. They are the only cases thus far that have had the rule applied to sustain contracts and are all cases in which an attorney's fee is allowed, which is different from the case at bar, that being a case of penalty and inflicted to for the avowed purpose of preventing the defendant from going into Court. A deliberate attempt, by making him go into Court on unequal terms with his antagonist, to deprive him of the right to litigate claims against him.

We would remark as to these insurance cases that while they grow out of contracts and are classed as insurance contracts by this Court, there is not the want of mutuality there which exists here. The contracts have penalties provided by way of forfeiture against the insured when he failed to comply with the conditions of the contract and the Statute then placed and the Court enforced a mutual penalty as against the company when it failed to carry out its part of the contract and equality was thus maintained.

The case of M. K. & T. R. R. Co. vs. May referred to by the Supreme Court of South Carolina was decided in hesitating language by a bare majority of the Court on the ground that the scattering of seed of Mexican weeds by passing trains, and the tendency by the Railroad Company to ignore them as it was not engaged in husbandry, and they might have added the right of eminent domain which gave them the right *Nolens Volens* to go through a man's land and establish themselves where they can spread such grass and weeds at their neighbors' door justifies placing them in a class. This may be true. It has no relation to this case and while possibly instructive in some aspects surely throws no light on the questions involved here.

Those questions I repeat and close.

1. Can the State after properly classifying contracts for shipment of freight in a class by themselves, provide penalties for one party to the contract if it violates it and give the penalty to the member injured, and not inflict a like penalty on the other party or parties when they violate the terms of the contract?

2. Can the Legislature place one of the parties to a contract, when litigation arises out of the same, in a position to be punished if it is wrong and to have no redress against the other party if right while the other party is rewarded if right and not punished if wrong and still be within the rule of equality before the law?

3. Can the Legislature discriminate against litigants giving the one an advantage over the other where cause of action arises out of a contract to which both are paries?

4. Can the Legislature inflct a penalty for non-payment of a debt on one of the parties to a contract out of which the debt grows and not inflict any penalty for non-payment of a debt on another party to the same contract or contracts of the same class.

W. F. STEVENSON,
STEVENSON & MATHESON,
EDWARD MCIVER.